The Future of Public Employee Free Speech After Garcetti

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The Supreme Court considerably impacted the law governing public employee free speech in its landmark ruling, Ceballos v. Garcetti where the court distinguishes between speech that is made as part of one's official employment duties, and speech that comes from one's capacity as a normal citizen.[1] The First Amendment of the United States Constitution protects free speech, and also preserves the government's interest in maintaining the efficiency and effectiveness of its agencies.[2] In cases where a public employee suffers an adverse employment action due to their speech, the courts have found that although it is not unconstitutional for the government to place restriction on the terms of employment, the public employees do not lose all of their First Amendment rights.[3]

I. Public Employee Speech Protection: The Pickering Analysis

Before the Garcetti ruling the federal courts determined whether public employee free speech was protected under the first amendment through a two part test as articulated in Pickering v. Board of Education.[4] First, the court would determine whether the speech at issue was of public concern by analyzing the form content and context of the speech.[5] The second part of the test for First Amendment protection for speech by public employees was a weighing of interests between the public concern value of the speech and the government employer's interest in suppressing the speech.[6] The court would examine factors such as the time, place and context of the speech to assess whether the speech impinged upon a strong enough governmental interest to warrant the First Amendment limitation.[7] Thus, the ethos of the Pickering line of opinions was that as long as the speech was of public concern and that operation of Governmental agencies was not considerably hindered, the speech of government employees was protected under the First

[1] *Ceballos v. Garcetti*, 126 S.Ct. 1951 (2006).
[2] U.S. Const. amend. I; *See Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).
[3] *Pickering*, 391 U.S. at 568.
[4] *Id.* at 568; Ceballos v. Garcetti, 126 S.Ct. 1951 (2006).
[5] *See Connick v. Meyers*, 461 U.S. 138, 147-48 (1983).
[6] *See Id*. at 143; *See also supra*, note 3 at 568-69.
[7] *See Rankin v. McPherson*, 483 U.S. 378, 390-91 (1987); *See also Connick*, 461 U.S. at 152.

Amendment.[8]

II. The Garcetti Decision

The Supreme Court, in its Garcetti ruling, revised the Pickering doctrine by drawing a distinction between speech made within a governmental employee's professional duties, and speech made as a citizen.[9] This distinction preempts the inquiry of whether the speech is of public concern, or to what extent it disrupts the efficiency of a governmental agency. The plaintiff in Garcetti was a deputy district attorney for the State of California. After making statements via an internal memorandum, a number of telephone conversations, and at meetings about authorization for a warrant that he felt was dubious the plaintiff alleged that he suffered retaliation in the form of reassignment and deprivation of a promotion. Justice Kennedy, writing for the Court, reasoned that since some of the speech at issue had come from an internal memorandum the employee authored as part of his official employment duties, to find that the employee is insulated from discipline based on that speech would go against precedent that grants that government employers discretion over their own affairs.[10] Kennedy warns against such judicial intrusion that is "inconsistent with the sound principles of federalism and the separation of powers." If, on the other hand, the plaintiff's speech had originated from his capacity as a citizen, rather than as a governmental employee, the regular Pickering analysis would apply.[11] With regard to the other instances of speech the court remanded the case with instructions to follow the new standard they had announced.[12]

The two part Pickering test: determining whether the speech is of public concern, and the balancing of the public concern value against the efficient administration of the governmental agency, has become a three part test through Garcetti.[13] Now the court must engage in a factual inquiry into whether the speaker was speaking in accordance to his or her employment duties, or as a citizen before reaching the other elements of

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[8] *See supra* note 5 *passim*; *See also supra* note3 *passim*; *See also Rankin,* 483 U.S. 378 *passim*; *see also* U.S. Const. amend. I.
[9] See *supra* note 1 at 1960; supra note 3.
[10] See supra note 1 at 1960.
[11] See *supra* note 3 at 568.
[12] See *supra* note 1 at 1962.
[13] See supra note 1 at 1960.

the Pickering analysis.[14]

III. Implications and Questions After Garcetti in California

In the wake of Garcetti many commentators have remarked that that the court's decision was a huge blow to governmental whistle-blowers.[15] Now speech that results from employment duties does not receive First Amendment protection. Even if the speech is of highly important public concern and would be protected if repeated by those with same employer but different official job duties. This holding seems to imply that First Amendment protection from retaliation because of one's workplace speech may hinge on minor variations in one's job description irrespective of the speech's content.[16]

IV. Professional Obligations: Do Ethical Codes and Regulations Engender Greater First Amendment Protection?

The distinction between workplace speech that is in accordance with official job duties and speech that is necessitated by professional oaths, standards and obligations (e.g. Hippocratic Oath, legal ethics standards, professional codes of conduct etc.) create an interesting tension in determining whether speech deserves First Amendment protection under the Garcetti test.[17] As Justice Breyer notes is his dissent, professional speech is often subject to "independent regulations by canons of the profession."[18] Garcetti is a good example of this issue because the plaintiff was a California lawyer and would be subject to ethical obligations of the California Bar.[19]

It is not yet cleat whether government has a strong enough interest to exempt speech that is pursuant to professional ethical obligations from first amendment protection in other cases. Although Justice Breyer

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[14] *Supra* note 3 at 568.
[15] Supra note 1;First *Amendment Attorneys Debate Impact of Garcetti In Bringing, Defending Whistleblower Claims*, Daily Labor Report (BNA, Washington, D.C.) Apr. 24, 2007 at 78, C-1 (quoting April 20 Georgetown CLE annual Section 1983: *Civil Rights Litigation Seminar*); May 21, 2007 Legal Times Vol. 30, No. 21,; Linda Greenhouse *Some Whistle-Blowers Lose Free-speech protection*, N.Y. Times, May 31, 2006 at A16.
[16] *See Supra* note 1 at 1963.
[17] *See Supra* note 1 at 1960.
[18] *See Supra* note 1 at 1971 (Commenting that the need to protect public employee disclosures is augmented when the speech is regulated by professional ethical standards).

asserts that the governmental interest in controlling the speech is diminished, this is a fact intensive inquiry and it is foreseeable that the courts could split.

For example, in Shewbridge v. El Dorado Irrigation District the plaintiff, an outspoken engineer and county employee, alleged that he had suffered an adverse employment action due to his disclosures on wasteful water management by his employer, El Dorado County.[20]

The plaintiff alleged that he was compelled to disclose the mismanagement because of his ethical and professional obligations as an engineer pursuant to the California Code of Regulations that govern engineers.[21] While the court in this case engaged in the "critical inquiry" of whether the plaintiff's speech was due to professional responsibilities, the plaintiff argued that his official job duties and professional obligations are indistinguishable.[22] The court found that there was enough doubt on the point of whether as a matter of fact there is a distinction between job duties and professional ethical obligations, where the latter would be subject to protection and the former may be disciplined at the discretion of the governmental employer, to defeat a motion for summary judgment.[23]

The court, in Shewenbridge, treats the issue of whether professional obligations and official job duties should be considered as speech in the capacity of an ordinary citizen or speech pursuant to official work duties as a matter of fact, neither commenting on whether both categories may ever cohere nor whether they are mutually exclusive.[24]

Shewenbridge serves as an introductory example of how the courts would treat speech made in accordance with a professional obligation, and addresses questions of whether such disclosure should be considered the speech of an employee or that of a citizen.[25] Because of the wealth of statutory imperatives that regulate the ethics of many government employees, this issue creates important policy implications,

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[19] *Supra* note 1.
[20] *Shewbridge v. El Dorado Irrigation District*, WL 3741878 (E.D. Cal. 2006).
[21] *Supra* note 20 at 6.
[22] *See supra* note 20 at 7.
[23] *Supra* note 20 at 7.
[24] *Supra* note 20.
[25] *See supra* note 20 at 7.

especially regarding employees who would have to choose between making a disclosure mandated by ethical regulations and opening themselves up to possible retaliation.

V. The Law Associated With Malpractice May Inform Garcetti Inquiries

In employment law a plaintiff's attorney often confronts fact patterns where illegal justifications for adverse employment actions are shrouded in legally justifiable explanations. The difficult distinction between protected speech that is made pursuant to professional ethical obligation, and unprotected speech of official employment duties may obscure a public employer's retaliatory intent. Scenarios where an employer may attempt to escape court scrutiny for retaliatory adverse employment actions by claiming that the speech was within the official job duties, thus is not protected by, may arise due to the holding in Garcetti.[26]

Such instances require a fact intensive inquiry of whether workplace speech is made in accordance to job duties and whether they are dictated by the ethical regulations or mores of the profession. In determining whether speech is so regulated, employment law, in this case, should be informed by the methods of malpractice litigation. The malpractice conventions by which expert witnesses testimony, statutes, and regulations are used as comparative evidence are well suited to exposing instances of retaliation under the pretext that the employer can place restrictions on work place speech. Here the question of whether to view workplace speech as dictated by professional ethical obligations or as job duties is: would a competent similarly situated professional employ the same judgment?

In this way the well-worn concepts from the law of torts regarding expert opinion, and using statutes and regulations as evidence would aid the trier of fact in protecting the governmental employee from retaliation against speech that reflects little more than due diligence.[27]

By protecting against employers taking advantage of the Garcetti's ruling as a pretext, the court is able

[26] *Supra* note 1
[27] Fed. R. Civ. P. 702; *Day v. Rosenthal*, 170 Cal.App.3d 1125, 1146 (holding that pertinent bar rules were relevant to the standard of care in a legal malpractice action); *See* Restatement (Second) of Torts § 299A (1965)

to pay respect to administrative autonomy with minimal intrusion.[28]

The Future for Whistle Blowers

It may still be to early to discern the lasting effects of Garcetti in California or the Ninth Circuit but a number of cases have already demonstrated that the threshold for claiming first amendment protection is definitely higher.[29] In Judge Reinhardt's opinion for the court for Freitag v. Ayers the court remands the case to apply jury instructions that are in keeping with the Garcetti inquiry.[30] The case involves a female prison guard that alleges that she was retaliated against for her speech complaining about her supervisor's inaction regarding persistent sexual harassment and a hostile work environment.[31] The plaintiff's speech partially consisted of correspondence complaining about her supervisors to the director of the California department of Corrections and Rehabilitation and to the Inspector General (IG).[32] Although the case was remanded, the court does conclude that in communicating with the Inspector General the plaintiff spoke as a citizen without requiring a factual inquiry into her official job duties.[33] This conclusion establishes notable exceptions to the Garcetti inquiry within the Ninth Circuit.[34] Where the court will go from here is unclear.

VI. State and Federal Legislative Solutions

There was a considerable backlash by those who felt that First Amendment protection for governmental whistle-blowers had suffered a considerable blow because of the court's decision in Garcetti. Some who criticize the Garcetti ruling have turned to existing state and federal legislative solutions to protect whistleblowers.[35] Justice Kennedy's opinion in Garcetti somewhat mitigates the courts ruling by alluding to the "powerful network of legislative enactments such as whistle-blower protection laws and labor codes" as an alternative to first amendment protection for employee speech, and it is not clear to what extent the

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[28] *Supra* note 1.
[29] Supra note 1; *Meyer v. Napa State Hospital*, 2007 WL 128231 (N.D.Cal. 2007) (ruling that where plaintiff does not dispute speech was pursuant to job duties speech is not subject to first Amendment protection); *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985 (9th Cir. 2007) (discussing how in Garcetti the court illustrates a greater deference for the legitimate interests of the government as an employer regarding restrictions of free speech).
[30] Supra note 1; *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006).
[31] *Ayers*, 468 F.3d at 533-46.
[32] *Supra* note 31 at 535.
[33] *Supra* note 31 at 545.

Garcetti ruling would affect the application of those codes, if at all.[36] Nonetheless, despite various federal and state whistle-blower protection laws, It is now harder for plaintiffs to seek vindication of their rights in Federal Court, and not all states have Whistle-blower protection laws as comprehensive as California's.[37] Furthermore, in many cases statutory protection for whistle-blowers in many states do not always extend to county and municipal employees.

Garcetti has made an impressive impact on the terrain of public employee free speech, and many of its implications are not certain. Nevertheless, the court does not have to start from scratch in developing this area of the law.[38] Furthermore, many of the concepts that apply to the law germane to malpractice litigation may be well suited to protect whistle-blowing employees who disclose in accordance with the ethical traditions and regulations of their profession.

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[34] *Supra* note 1.
[35] Supra note 1; U.S. Const. amend. I.
[36] *Supra* note 1 at 1962.
[37] Federal Employee Protection of Disclosures Act, S.274 110th U.S. Cong. (2007); 5 U.S.C. § 2302(b)8; Cal Gov. Code § 8547.8; Cal Lab. Code § 1102.5; Cal Rules of Prof. Con. §§ 5-110 (2005); *supra* note 1.
[38] *See supra* note 1.